



The Republican Party is still fractured on criminal justice reform

Judge Ketanji Brown Jackson's Supreme Court hearing underscored these divides.

By Li Zhou
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During Judge Ketanji Brown Jackson's confirmation hearing, Republicans reiterated many of the attack lines they've been using on Democrats when it comes to the issue of crime.

"The Biden administration is committed to these soft-on-crime policies," said Sen. Tom Cotton (R-AR). "Liberal judges who have more sympathy for the victimizers than for the victims are a big part of the problem."

"[The best way to deter people viewing child porn] is to put their ass in jail," said Sen. Lindsey Graham (R-SC) as he criticized Jackson's sentencing decisions in such cases.

Throughout the hearing — and increasingly everywhere else in recent months — many have embraced a "tough on crime" stance. That comes in response to an uptick in violent crime during the pandemic and **corresponding voter concerns** about it.

"Under one-party Democrat rule in Washington, American families are facing ... a crime crisis," **House Republicans posted in a March tweet**. "Crime is surging across the country," Senate Republicans **emphasized in February**. "The results of Democrats' soft-on-crime policies are clear."

The rhetoric in Jackson's hearing and in broader GOP messaging have seemed like a departure from the focus on **criminal justice reform** that the party had as recently as 2018, when the majority of Senate Republicans backed sentencing changes for **nonviolent offenders in the First Step Act**. The party back then was eager to show it had made progress on an issue that arose from Congress's efforts to crack down on crime decades ago. (Many of these efforts notably excluded violent offenders or sex offenders that Jackson was spuriously accused of going easy on.)

There are some Republicans who are reluctant to evangelize criminal justice reforms now, advocates say, since increases in crime have become a GOP talking point. According to a **study**

from the Council on Criminal Justice, the homicide rate across 22 major cities was up 5 percent in 2021 compared to 2020, and up 44 percent compared to 2019.

“I think your average conservative, or average Republican, may have supported the First Step Act, but I have the impression that the average conservative has backed off from where they were,” says Clark Neily, a senior vice president of legal studies at the Cato Institute.

Experts emphasize, however, that the most aggressive moments in the hearing are not indicative of how open a segment of Republicans still is to important but limited criminal justice reforms.

Just last week, 10 **Republicans signed on to cosponsor the Equal Act**, legislation that would reduce the sentencing disparities between crack cocaine and powder cocaine. The legislation — which would make penalties the same for the two substances — has yet to be considered on the floor but could pass with the GOP support it has. Currently, sentencing standards are far more severe for crack cocaine, a disparity that disproportionately affects Black offenders.

“The fact of the matter is that all who work in DC politics understand that congressional hearings basically exist for political grandstanding, and that’s pretty much it,” says Jason Pye, a director at the criminal justice reform group Due Process, who lobbied Republicans on the First Step Act. “There are plenty of Republicans in the Senate who will vote for bills like this because they think it’s the right thing to do.”

There’s a Republican split on reforms

The rhetoric at Jackson’s hearing revealed divides within the party on the issue and the subjects that Republicans aren’t interested in addressing via reforms.

For years, the party has been fractured on the subject with senators like Tom Cotton (R-AR) opposed to virtually any reforms, while others like Sens. Rand Paul (R-KY), Mike Lee (R-UT) and Tim Scott (R-SC) have led efforts for sentencing reforms for nonviolent drug offenses and police reforms.

“There are upwards of 20 Republicans who are gettable, but there are going to be the ones who always oppose you. You start with the list of the no votes on these bills,” says Pye.

These differences were on full display at the hearing, with Cotton, Sen. Josh Hawley (R-MO), and Sen. Ted Cruz (R-TX) among the most vocal critics of Jackson’s sentencing record on child porn cases. (While Cruz voted for the First Step Act, **it took key tweaks for him to ultimately do so.**)

And even among those supportive of reforms, like Lee and Graham, a focus on child porn cases echoed where they’ve stood on violent crimes and sex crimes related to children. Even though they back sentencing changes for nonviolent drug offenders, they take a very different approach to violent crimes.

“Even in the First Step Act, you had a lot of carveouts,” says Brett Tolman, the head of the conservative advocacy group Right on Crime. “They spent a lot of time carving out crimes of violence, of child porn.”

Reforms on drug sentencing that Republicans do back didn’t come up as much, since they didn’t relate to the chief **line of attack** from committee members on Jackson’s sentencing. Notably, though, a sizable group of Republicans continues to support them. **Those cosponsoring the Equal Act**, for example, include Sens. Paul, Rob Portman (R-OH), Thom Tillis (R-NC), Lindsey Graham (R-SC), Lisa Murkowski (R-AK), Susan Collins (R-ME), Cynthia Lummis (R-WY), Shelley Moore Capito (R-WV), Jerry Moran (R-KS), and Richard Burr (R-NC).

Republicans have been less vocal about reforms in general given the attention on crime rates, says Tolman. At the state and local level, many Republican officials have also pushed back on progressive prosecutors, policies like changes to cash bail, and reduced prosecutions for low-level offenses.

“I think they’re often scared that if ... crime continues to increase, no one wants the blame placed on them,” says Jillian Snider, the policy director for the criminal justice and civil liberties team at R Street Institute.

There’s also the Trump factor. During his presidency, Trump’s support of the First Step Act helped to get Republicans who were on the fence on board. Without his advocacy on the issue now, some lawmakers are likely less open to this idea.

“It’s certainly true that President Trump, when he was in office and told McConnell to put it on the floor, that helped us out, and got us votes we otherwise wouldn’t have had,” says Pye.

There’s still interest in (some) bipartisan criminal justice reform

Recent progress on criminal justice reform indicates that there’s still bipartisan interest in narrower policies.

Republicans’ backing for the Equal Act — a pretty limited bill — is still significant. It’s not yet clear if the legislation will move forward in the Senate, though it now has sufficient Republican support.

In the past, Republicans have similarly been open to very targeted policies.

The First Step Act, for example, enables just a subset of federal inmates to shorten their sentences. Other more ambitious reforms, meanwhile, have floundered.

Previous discussions on police reform collapsed because Democrats were pushing for a more expansive bill that eliminated qualified immunity, legal protections that police have that shield them from liability. Republicans, meanwhile, were not interested in removing these protections.

The Next Step Act, legislation sponsored by Sen. Cory Booker (D-NJ) to reduce mandatory minimums for nonviolent drug offenses and provide more police training, has failed to get any traction, either.

Republicans' openness to the Equal Act signals that there's enduring bipartisan potential for reforms, even though the party's overall rhetoric doesn't always reflect this support.